Dallugge, 72 Neb. 16, 101 N. W. 244. The New Hampshire court in *Harris* v. *Webster,* 58 N. H. 481, held that the husband is no longer liable for his wife's torts, because he no longer controls her property. In Vermont this liability has been expressly abrogated. *Story* v. *Downey,* 62 Vt. 243; *Vermont Statutes of 1894,* § 2648.

The question of damages seems to have been raised in but few cases. Although none are in point with the principal case so far as the measure of damages is concerned, yet exemplary damages have been awarded against the husband for his wife's slanders in a few cases. They were allowed in *Fowler* v. *Chichester,* 26 Ohio St. 9, and in *Patterson & Wallace* v. *Frazer,* — Tex. Civ. App. —, 93 S. W. 146. However, this latter case was reversed on a different ground. 94 S. W. 324. Before the husband's liability was abolished in Vermont exemplary damages were awarded in *Lombard* v. *Batchelder,* 58 Vt. 558, 5 Atl. 511. Nor will the damages be diminished even though the husband requires the wife to retract the slanderous utterances. *Mousler* v. *Harding,* supra.

Where the husband is liable the question has been raised whether the wife's separate estate should be subjected to the payment of the judgment. In commenting upon the case of *Seroka* v. *Kattenberg,* supra, the *Central Law Journal,* Vol. 23:364, says: "One aggrieved by the tort of a wife has under the act in question this advantage, he may sue both, and upon recovering a judgment may have it satisfied out of the separate estate of the wife, under the statute, or of the husband, under the common law, or out of both, and may exhaust both if necessary to satisfy the judgment." In the case of *McQueen* v. *Fulgham,* supra, the question was raised whether the wife's separate estate or the community property should be taken to satisfy the judgment. The question was not decided in that case, but in *Zeliff* v. *Jennings,* supra, it was held that the wife's separate estate should be first exhausted before the husband's property was taken. J. E. W.

SUFFICIENCY OF A VERDICT WHICH FAILS TO FIX THE TIME OF AN ATTEMPT TO COMMIT BURGLARY, THE PUNISHMENT VARYING WITH THE TIME.—The Supreme Court of Montana in *State* v. *Mish* (1907), — Mont. —, 92 Pac. Rep. 459, has recently decided an interesting point relative to the sufficiency of a verdict, which failed to find whether an attempt to commit burglary was made in daytime or in nighttime when punishment is graduated accordingly as the attempt is made in daytime or in nighttime. The case is important because many other states have statutes similar to those of Montana. Apparently, however, only one other case has arisen on a similar state of facts, and that case is in conflict with the principal case.

In the principal case the defendant was tried for an attempt to commit burglary. The jury returned a verdict of guilty. The court then imposed sentence for 7 1-2 years in the state prison. By the statutes of Montana (PENAL CODE, § 821) burglary is divided into two degrees. Burglary in the first degree is burglary committed in the nighttime. It is punishable by from one to fifteen years in the state prison. Burglary in the second degree is

burglary committed in the daytime. It is punishable by imprisonment not exceeding five years (PENAL CODE, § 822). The Revised Statutes provide that when a person is found guilty of a crime divided into degrees, the jury, by their verdict, shall find of what degree the person is guilty. (PENAL CODE, § 2145.) Attempts to commit burglary are not expressly divided into degrees by statute. Instead, what constitutes an attempt is defined in general terms (PENAL CODE, § 1229), and it is provided that the punishment for an attempt to commit a crime which is punishable by imprisonment for more than five years shall be punishable by imprisonment for a term not exceeding one-half the longest term of imprisonment prescribed on conviction of the offense attempted, and an attempt to commit a crime which is punishable by less than five years shall be punishable by imprisonment in the county jail for not more than one year. (PENAL CODE, § 1230.) Thus, if the attempt to commit burglary is made in the nighttime, it is punishable by imprisonment not exceeding seven and one-half years. If the attempt is made in the daytime, it is punishable by imprisonment not exceeding one year. Quite naturally, therefore, three questions arise in the principal case. First, in contemplation of the Montana statutes, is an attempt to commit burglary divided into degrees; second, if divided into degrees, will a verdict be set aside for failure to find the degree; third, even if attempts to commit burglary are not divided into degrees, is the verdict in the principal case good?

The majority opinion maintains that by the Montana Statutes attempts to commit burglary are not expressly divided into degrees. Hence, the statute requiring the jury to find the degree does not apply. Furthermore, there is a presumption in favor of proceedings of the trial court and therefore, in the absence of the record giving all the evidence, it will be presumed that the evidence was sufficient to justify the court in inflicting punishment for an attempt to commit burglary in the nighttime. For all the court knows, it is argued, there may have been no question but that the attempt was made in the nighttime. The dissenting opinion, however, maintains that, since the crime of burglary is divided into degrees, the crime of attempting to commit burglary is divided into degrees when the punishment to be inflicted depends upon the degree of burglary attempted.

In *People* v. *Travers*, 73 Cal. 580, 15 Pac. 293, the defendant was convicted of an attempt to commit burglary as in the principal case. The California statutes, as far as is material, were the same as those of Montana. The verdict was held deficient. The court seems to think it obvious that, where burglary is divided into degrees, an attempt to commit burglary is divided into degrees. This appears to be the only case directly in point.

The reasoning of many cases when applied to the facts in the principal case seem to argue that the crime of attempting to commit burglary is divided into degrees. The reason of the statute which requires the jury to find the degree is that the court may know what punishment to inflict. *Dick* v. *State*, 3 Oh. St. 89. Consequently, the test to determine whether a crime is divided into degrees so as to fall within that statute is not necessarily whether, by the law of the state, a crime is expressly said to be divided into

degrees. The true test would seem to be whether different grades of punishment are assessed for different grades of the crime. *Loften* v. *State,* 121 Ga. 172, 48 S. E. 908; *Benbow* v. *State,* 128 Ala. 1, 29 So. 553. Such reasoning, applied to the principal case, would reverse the decision, because there is a difference between the punishment inflicted for an attempt to commit burglary in the daytime and in the nighttime.

Once determined that, in contemplation of the statute, an attempt to commit burglary is divided into degrees, and the conclusion is clear. The overwhelming weight of authority is that a verdict failing to find the degree of the crime as required by statute is fatally defective. *Tully* v. *People,* 6 Mich. 273; *State* v. *Reddick,* 7 Kan. 143; *Kirby* v. *State,* 15 Tenn. 259.

But even if it be conceded that, according to a strict construction of the statute, attempts to commit burglary are not divided into degrees, still the reasoning of the principal case is not entirely unimpeachable. It has often been held, irrespective of statutes, that the record of conviction should point out with precision the sentence or judgment the court should inflict. *Neville* v. *State,* 26 Ark. 614; *Thomas* v. *State,* 38 Ga. 117; *Thomas* v. *State,* 5 How. (Miss.) 20. In none of these cases was the decision based on statutes requiring the jury to find the degree (apparently no such statutes existed), but on the rule that the verdict must guide the court as to the penalty to be imposed. Surely, in Montana, a verdict of guilty of attempt to commit burglary does not show the court what punishment should be inflicted. But we must not disregard the strong argument of the majority opinion that the presumption favors the proceedings of the lower court and that, in the absence of the record giving all the evidence, it will be presumed that the proceedings were in accordance with the evidence. *State* v. *Shepphard,* 23 Mont. 323, 58 Pac. 868; *State* v. *Gordon,* 35 Mont. 458, 90 Pac. 173. Hence it will be presumed that the trial judge was justified in inflicting the punishment he did. In a state where there is no reversal unless prejudice is actually shown, such an argument is very strong. S. W. D.

GRANTOR'S REMEDY ON BREACH OF CONDITION SUBSEQUENT.—In *Mash* v. *Bloom* (1907), — Wis. —, 114 N. W. Rep. 457, the court holds (SIEBECKER and TIMLIN, JJ., dissenting) that one, having conveyed real property subject to a condition subsequent, has no right of action to recover possession on breach of the condition until he has taken "advantage of condition broken and so notified the defendant, either by demand of possession or some other act equivalent to a re-entry for condition broken."

The plaintiff had made a deed of conveyance of the premises in question in consideration of $1.00, natural love and affection, and upon the "special considerations and conditions" that defendant and his wife should care for the plaintiff and administer to her natural wants "as good, loving, affectionate and kind children would do for a parent." The plaintiff had previously sought by a suit in equity to enforce her rights under the deed, and had asked to have it cancelled as a cloud on her title, but the court had held that she had a complete and adequate remedy at law and might enforce her rights